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No. 83 - 644

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1983

ROBERT C. HATCH, CLAUDIA R. HATCH,
and TRUSTORS OF HERITAGE TRUST COMPANY

Petitioners

vs.

RELIANCE INSURANCE COMPANY and
JOHN R. BROMLEY

Respondents

ON WRIT OR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PLAINTIFF'S PETITION FOR WRIT

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Attorney for Petitioners

A. QUESTIONS FOR REVIEW

1. Can a Federal Court remove a case from a State court on grounds of diversity of citizenship where plaintiffs and an indispensable defendant in the State Court Case are resident citizens of the same state?

2. Is a co-conspirator an indispensable defendant in a suit charging conspiracy against only two defendants?

B. DESIGNATION OF PARTIES

The caption of the case in this Court contains the names of all parties. (By local rule 21, the United States Court of Appeals for the Fifth Circuit excludes naming the United States District Court Judge in a petition for writ of mandamus to remand a case to the State Court - the Appeals Court proceeding sought to be reviewed herein, along with the Orders of the District Court.)

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TEXT

E. REFERENCE TO OPINIONS IN COURTS BELOW

For the sake of brevity just one of three Orders of the United States District Court for the Southern District of Texas, Galveston Division, is being challenged herein. A copy of that Order - designated No. 2 - is reproduced as Appendix A. Plaintiffs' Rule 59(e) motion to alter or amend said Order is Appendix B. The District Court refused consideration of said motion, returning it unfiled.

The denials of plaintiffs' petition for mandamus and petition for rehearing and suggestion for rehearing en banc to the United States Court of Appeals for the Fifth Circuit were effected by check marks on a form, with no opinions, so are not reproduced.

A relevant opinion of the State Court from which the case was improvidently removed - the District Court for Galveston County, Texas - is reproduced as Appendix C with supporting memorandum.

F. STATEMENT OF JURISDICTIONAL GROUNDS

This petition is brought to review the July 29, 1983 denial by the United States Court of Appeals for the Fifth Circuit of petitioners' petition for writ of mandamus to the United States District Court for the Southern District of Texas, Galveston Division; to review the Appeals Court's Orders of September 19, 1983 denying rehearing and Rehearing En Banc; and to review the District Court's Order of June 29, 1983 denying petitioners' leave to amend their complaint and add an indispensable defendant, thereby denying petitioners' motions to dismiss and remand the case to the State Court.

The statutory provision believed to confer on this Court jurisdiction to review the orders of the District and Appeals Courts is 28 U.S.C. Sec. 1254 (1).

G. CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. Section 1441 Actions Removable Generally.

(a) . . .

(b) Any civil action of which the district courts have original jurisdiction founded upon a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence of the parties. Any other such action shall be removable only if none of the parties properly joined and served as defendants is a citizen of the State in which such action is brought. (Emphasis supplied). (Section 1441 is reproduced in full in Appendix D.)

Federal Rules of Civil Procedure. Rule 19. Joinder of Persons Needed for Just Adjudication.

(Rule 19 is reproduced in full in Appendix E).

Federal Rules of Civil Procedure. Rule 59. New Trials; Amendment of Judgment

(Rule 59 is reproduced in full in Appendix F).

28 U.S.C. Section 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of

Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

H. STATEMENT OF THE CASE

1. Material Facts

In 1972 one John R. Bromley collaborated with Reliance Insurance Company, a transnational conglomerate, to obtain a bonded insurance policy offering protection to investors in Bromley's company, Heritage Trust Company, an Arizona Corporation. The Reliance policy insured against losses from fraudulent or dishonest acts of Heritage employees. The policy was widely advertised and served to induce investors, most of them older citizens, to entrust their money to Heritage. Approximately twelve million dollars was lost out of more than one thousand "revocable intervivos trusts," the vehicle of the fraudulent scheme managed by Bromley.

On July 29, 1974, the S.E.C. filed a civil action in the United States District Court for the District of Arizona (S.E.C. v. Heritage Trust Co., John R. Bromley et al., 402 F. Supp. 744). In July, 1975, judgment for fraud was entered against Bromley, et al. (In March, 1983, Bromley, a citizen of Texas, was convicted of criminal fraud, sentenced to three years and placed on probation). Following the S.E.C. judgment, Robert and Claudia Hatch filed suit in the District Court of Galveston County, Texas against Heritage, Bromley, et al.

On March 5, 1976 judgment for fraud and violating twelve Texas statutes was granted to Mr. & Mrs. Hatch against Heritage, Bromley and other co-conspirators (Case No. 114,361 - District Court of Galveston County, Texas).

On April 16, 1976 Heritage Trust Co. was placed in receivership by the Superior Court of Maricopa County, Arizona. Almost none of the lost twelve million dollars was found in the assets of Heritage.

The Hatches garnisheed the debt of Reliance owed on the bonded insurance policy (Case No. 114,361A). The garnishment case was removed by Reliance by an interpleader action to the United States District Court in Phoenix. That Court denied the garnishment claim. Plaintiffs appealed to the Ninth CCA, then to the Supreme Court which denied their petitions for writ of certiorari (No. 81-1704), and reconsideration. The Arizona United States District Court dismissed them from the garnishment action. Reliance then quickly settled by making a small payment to the Receiver for Heritage, the other defendant party in that action. The Supreme Court's denial of plaintiffs' petition for rehearing, on June 3, 1982, was the final proceeding in the interpleader action.

Mr. & Mrs. Hatch then, on their own behalf and as representatives for all other defrauded trustors of Heritage, filed again in the Galveston County Court, charging conspiracy, an alternate claim reserved by plaintiff in the garnishment action; and charging abuse of process arising from acts by Bromley and by Reliance before, during and following the interpleader action. The new case was placed on the Galveston County Court 1982 docket as No. 123-723. It was determined by the State Court to be a supplement and continuation of the former action (114,361A) which had been dismissed for lack of prosecution,

without notice to plaintiff (Appendix C). Reliance again removed the cause to the Federal Court by petition for removal on grounds of diversity. The United States District Court for the Southern District of Texas, Galveston Division, in one of three Orders rendered on June 29, 1983, transferred the file to the United States District Court for the District of Arizona, prior to considering plaintiffs' Rule 59 motion to alter or amend and prior to plaintiffs' appeal to the United States Court of Appeals for the 5th Circuit, which peremptorily denied the appeal, and denied rehearing and suggestion for rehearing en banc. This petition for writ of certiorari is now submitted for review of one of the June 29, 1983 Orders by the United States District Court, it being unnecessary to take up this Honorable Court's time for consideration of the other errors in the District Court's findings.

2. Basis for Jurisdiction of Federal Court of First Instance

Petitioners believe the United States District Court for the Southern District of Texas improvidently removed this State Court case and has acquired no proper basis for jurisdiction. Had such removal been proper, jurisdiction would have to be remanded to the State Court originally acquiring jurisdiction, since the State Court plaintiffs and defendant John R. Bromley are citizens of the same state — Texas.

I. ARGUMENT

1. Errors in District and Appeals Courts Below

28 U.S.C. Sec. 1441 (b) provides that any civil action, other than one arising from the Constitution, treaties and Statutes of the United States, shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Plaintiffs in the improvidently removed State Court case - No. 123,723 in the District Court of Galveston County, Texas - are citizens of the State of Texas and were so at the time suit was commenced. There are two defendants in the State Court case: Reliance Insurance Company and John R. Bromley. The citizenship and principal place of business of Reliance was not stated in its petition to remove, as of the time the suit was commenced. By untimely amendment of its petition to remove, Reliance alleges that such citizenship and principal place of business of Reliance was in the State of Pennsylvania. The second defendant, John R. Bromley, is, and at the time of suit was, a citizen of Texas. Both defendants have been properly served and have filed answers. The answer of Reliance was filed in the Federal removal Court; that of Bromley was filed in the State Court. Plaintiffs' amendment of the State Court complaint was made prior to the amendment by Reliance of its Petition For Removal to state missing jurisdictional facts. Plaintiffs' amendment was not accepted by the Federal

Court, which removed the case and transferred it to the United States District Court for the District of Arizona. In his answer, Bromley contends he is not a party to the Federal action and that the Federal Court in Arizona now has jurisdiction and venue.

Rule 19 (a) of the Federal Rules of Civil Procedure provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party to the action if (1) in his absence complete relief could not be accorded among those already parties . . .

As plaintiffs will show, complete relief cannot be accorded to them in the absence of Bromley as a defendant.

Rule 19 (b) provides that if such a person (i.e., the person described in Rule 19 (a)) cannot be made a party, the court should dismiss the action, the absent party being regarded as indispensable.

The Courts below do not challenge the mandate to dismiss and remand stemming from Rule 19 (b). In its Order of June 29, 1983, Appendix A, the United States District Court for the Southern District of Texas, Galveston Division (the removal Court) states:

> **Plaintiffs propose to add Bromley, a Texas resident, as a co-conspirator . . .**
>
> **Regarding the addition of non-diverse parties, if, on the one hand, they are indispensable parties, the Court must join them and remand would be proper (citations omitted). On the other hand, the Fifth Circuit has stated that joinder and remand of not indispensable parties is "clearly improper" (citations omitted). Thus**

the critical question is whether Bromley is an indispensable party.

The Court then pronounces what plaintiffs will show to be an erroneous conclusion of law: "Co-conspirators are not indispensable parties" (citations analyzed herein below).

(Plaintiffs will show that an accurate statement of the law might be:- Co-conspirators are not indispensable parties if two or more co-conspirators remain as defendants in a case charging conspiracy.)

The Court then denied plaintiffs' motion to add John R. Bromley as party defendant . . . "unless prior permission of the court is obtained." (Prior permission was sought by plaintiffs' Rule 59(e) motion to alter or amend, timely filed with the Court. That motion was returned, unfiled and possibly unread, by the Clerk of the Court, contending that the file had been transferred to Arizona (the United States District Court for the District of Arizona). (Plaintiffs' motion to amend is reproduced as Appendix B.)

None of the three cases cited by the District Court in support of the conclusion that co-conspirators are not indispensable parties involved removal from the State Court, or FRCP Rule 19. In each case the defendants were arguing that Federal diversity jurisdiction did not exist since one or more possible non-diverse defendants were not joined or were dismissed from the complaint. In each case several diverse defendants were named or remained in the suit. Plaintiffs were attempting to preserve

Federal diversity jurisdiction. Defendants were seeking to defeat Federal jursidiction. It was held that omitting the non-diverse defendants was within the right of a plaintiff to sue whom he chose.

The first citation by the District Court Judge is: State of Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 65 S. Ct. 716, 89 L Ed. 1051 (1945). In this case defendants, opposing Georgia's motion for an injunction against 23 railroad companies, two of which were Georgia citizens, argued that Supreme Court jurisdiction was lacking, since a State may not invoke such jurisdiction in a suit against its own citizens; and contended that a suit against several defendants is improper if any of them, being necessary party defendants, are citizens of the State. The Court held that not all conspirators are necessary parties defendant in a suit to enjoin a conspiracy, saying, "If either of the defendants who assert this defense is a citizen of Georgia and is a necessary party, leave to file would have to be denied . . . In suit to enjoin a conspiracy not all of the conspirators are necessary parties defendant . . . The citizenship of the two defendants may be challenged by motion to strike . . . But if they are stricken, the Court would not lose original jurisdiction over the controversy between Georgia and the other defendants."

The second citation by the District Court Judge is: Herpich v. Wallace, 430 F. 2d 792 (5th Circuit, 1970). Once again, this case does not involve Federal diversity jurisdiction in a removal case. Defendants argue that plaintiff should join two parties whom plaintiff does not

wish to join, or the suit should be dismissed. Defendants contend the two parties are indispensable for them to defend against charges of violation of the Securities Exchange Act. The Appeals Court held, as to joining the two parties to the other defendants, they "do not appear to be so situated that disposition of this action might as a practical matter impair or impede their ability to protect the interests defendants claim they might have . . . joint tort feasors or conspirators are not persons whose absence from a case will result in dismissal for nonjoinder." (If the two parties had been named as the only party defendants, they, of course, would have been indispensable to a charge of conspiracy).

The third case cited by the District Court Judge is: Professional Life Insurance Co. v. Roussell, 528 F. Supp. 391, (D. Kan. 1981). One of several defendants claimed the suit should be dismissed because of an absence of diversity jurisdiction between one of the defendants and the plaintiff. Plaintiff amended his complaint to remove the non-diverse defendant. The Court held the dismissed defendant was not indispensable. The particular dismissed defendant was merely one of several co-conspirators; the diverse defendants remained in the case. Their presence as diverse co-conspirators justified Federal jurisdiction over plaintiff's cause of action for conspiracy, which requires at least two parties defendant in accordance with the age-old rule that a person cannot commit conspiracy by himself.

2. Each of Two Co-conspirators Is an Indispensable Party

The rule that two parties are indispensable defendants in an action for conspiracy goes back to the Middle Ages and is put forth rather recently in Blackstone's Commentaries, 1765 - 1769 A.D. (Univ. of Chicago Press Facsimile, Vol. 3, p. 126): ". . . the law has given a very adequate remedy by the action of conspiracy, which cannot be brought but against two at least . . ."; and Vol. 4, p. 136: ". . . there must be at least two to form a conspiracy . . ."

The most recent reported case found by plaintiffs is James R. Smith, M.D., et al. v. Northern Michigan Hospitals, Inc., et al., C.A. 6th Circ., 703 F 2d 942,951 - decided March 25, 1983 - holding ". . . It is recognition of this need which forms the basis for the rule that since a corporation cannot combine or conspire with itself, the acts of a corporation acting through its directors, officers and employees are not generally subject to condemnation under Section 1."

The law that two persons are indispensable as defendants in an action for conspiracy is so firmly established that, as in the James R. Smith case supra, even the joining of additional parties defendant such as employees of the principal defendant corporation does not meet the two-party test unless the additional parties are separate, independent entities.

It is ironic that the United States Court of Appeals for the Fifth Circuit, which sustained the ruling by the District Judge in the case sub judice, is the author of what is considered the leading case requiring dismissal of a complaint for conspiracy against a corporation where the complaint does not name another independent co-conspirator. In Nelson Radio v. Motorola, Inc., et al., 200 F 2d 911, cert. denied 83 S. Ct. 783, 345 U.S. 925, 97 L. Ed. 1356, 5th Circ. 1952, the Court held, "It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can . . ."

The Nelson Radio opinion is cited and followed as the law in eleven circuits throughout the United States. It is also the substantive law in the State of Texas, which law it is the duty of the Federal Court to follow (Pullman v. Jenkins, 305 U.S. 534, 59 S. Ct. 347, 83 L. Ed. 334).

A 1977 Texas case cites precedents in five different United States Courts of Appeal, including Nelson Radio, for the same rule of law. The case is Christopher v. General Computer Systems, Inc., 560 SW 2d 698, C.A. Dallas, 1977, reh denied, On Motion for Rehearing:

"We agree with the decision cited by appellant to the effect that a corporation cannot conspire with itself, no matter how many of its agents may participate in the corporate action. Worley v. Columbia Gas of Kentucky, 491 F 2d 256, 261 (6th Cir 1973); Dorsey v. Chesapeake & Ohio Ry., 476 F 2d 243, 245 (4th Cir 1973); Pearson v.

Youngstown Sheet & Tube Co., 332 F 2d 439, 442 (7th Cir 1964); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911, 914 (5th Cir 1952) cert. denied 345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356, (1953) . . . We accept also the rulings of certain Federal trial courts construing the Sherman Anti-Trust Act as requiring that a conspiracy in restraint of trade be shown by a concert of action between more than one individual person. Knutson v. Dailey Review, Ind., 383 F Supp 1346, 1359 (N.D. Cal. 1974) modified 548 F. Supp 1346 (9th Cir 1977); Windsor Theatre Co. v. Walbrook Amusement Co., 94 F. Supp 388, 396 (D. Md. 1950) affirmed 189 F 2d 797 (4th Cir 1951)."

Other cases in accord with Nelson Radio are: U.S. v. Alvarez, 610 F 2d 1250, on rehearing, 625 F 2d 1196 (C.A. Fla. 1980); U.S. v. Graves, 669 F 2d 964 (C.A. Tex. 1982); Dossuoy v. Gulf Coast Invest. Corp., 660 F 2d 594 (C.A. La. 1981); U.S. v. Lowry, 456 F 2d 341 (C.A. Tex. 1972); Richardson v. Chrysler Motors Corp., 257 F. Supp. 547 (D.C. Tex. 1966); Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103 (D.C. Tex. 1960); Solomon v. Houston Corrugated Box Co., Inc., 526 F 2d 646 (C.A. Tex. 1977); Hatley v. American Quarter Horse Assoc., 552 F 2d 646 (C.A. Tex. 1977)' Donaldson v. Werblow (N.D. Tex. 1953) 140 F. Supp. 244.

The Texas law defining conspiracy is stated by the Texas Supreme Court in Great National Life Ins. Co. v. Chapa, 377 SW 2d. 632: Conspiracy is "a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means."

In accord with that definition and with Christopher v. General Computer Systems, Inc. (supra), the Texas State Court properly permitted plaintiffs to amend their complaint to add Bromley as an indispensable party to the alleged conspiracy.

Under the rule dealing with necessary joinder of indispensable parties, the indispensability of parties depends upon State law. (Kroese v. General Steel Castings Corp., C.A. 1950. 179 F2d 760 - citing 3 Ohlinger's Federal Practice 355 et seq. (1948), cert denied, 70 S. Ct. 1026, 339 U.S. 983, 94 L. Ed. 1386; Dunham v. Robertson, C.A. Wyo. 1952, 198 F 2d 316; Jones Kettering Corp. v. A.M. Puller & Co., D.C. N.Y. 1970, 50 F.R.D. 311; Baker v. Rosenbaum's Estate, D.C. Puerto Rico 1972, 58 F.R.D. 496; Schwenn v. Pamida, D.C. Wyo. 1975, 392 F. Supp. 69; Inland Western Inv. Co. v. Winkler Realty Corp., D.C. N.Y. 1975, 65 F.R.D. 515; Wright Farms Cosntruction, Inc. v. Kreps, D.C. Vt. 1977, 444 F. Supp. 1023; CBS, Inc. v. Film Corp. of America, D.C. Pa. 1982, 545 F. Supp. 1382; Challenge Homes, Inc. v. Greater Naples Care Center, Inc., C.A. Fla. 1982, 669 F 2d 667., in which the corut states that the term "indispensable party" is merelv a conclusion arrived at after completing the analysis in this rule; only when a court finds that a person is one who should be joined but cannot be and that the litigation cannot go forward without the missing person is the term "indispensable" appropriate.

In every jurisdiction we have found, if a plaintiff brings an action for conspiracy against just one conspirator the case will be dismissed for failure to name a second co-conspirator (e.g., Black v. Vaeth, 285 N.Y.S. 2d 557, N.Y.

1967; Smith v. Town of Proviso, 301 N.E. 2d 145, Ill. 1973). A plaintiff may sue a single party for the wrongful tort committed by that party, but he may not sue one party alone for conspiracy to commit that tort. "An allegation that two defendants conspired is necessary to subject to liability those defendants who did not directly participate in the commission of overt acts." (Singer v. Singer, 14 N.W. 2d 43). Also, an allegation of conspiracy "may be pleaded and proved only in aggravation of the wrong of which plaintiff complains, or for the purpose of enabling him to recover against all of the conspirators as joint tort feasors, or for the purpose of holding one defendant responsible for the acts of his co-conspirators." (State of Missouri ex rel and to Use of Devault v. Fidelity & Casualty Co. of N.Y., C.A., Mo., 107 F 2d 343, 348).

In affirming the Fifth Circuit case of Pinkerton v. U.S., 151 F 2d 499, the Supreme Court made the essential distinction between a suit for a wrongful act and a suit for conspiracy to perform the wrongful act: "The commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses, and a substantive offense is not merged in the conspiracy." (328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489).

In Ianelli v. United States, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975), the Supreme Court quoted a 1949 opinion of Justice Jackson: "The basic rationale of the law of conspiracy is that conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish."

It is also well-established that an injured party may choose to sue for joint recovery, rather than suing for the wrongful act alone (in which case a joint tort feasor would not have to be named): Mecom v. Fitzsimmons Drilling Co., 248 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233; Cincinnati R. Co. v. Bohon, 200 U.S. 221, 26 S. Ct. 166, 50 L. Ed. 448.

3. Conclusion

In conclusion, plaintiffs' cause against defendants for conspiracy cannot proceed against Reliance unless the second co-conspirator, Bromley, is joined as has been done by plaintiffs' amended complaint in the State Court. Neither plaintiffs nor defendants can waive the jurisdictional requirements of Federal Courts. Reliance cannot be shown to be the principal perpetrator and executor of the fraudulent securities and real estate transactions; and cannot be sued alone for such frauds. Yet the entire fraudulent scheme can be proved at trial to have been made possible by Bromley's well-advertised assurances to the public that their investments were protected by insurance against losses due to fraudulent or dishonest acts. Bromley is the only individual who negotiated with Reliance and was explicitly named as covered in applications for the policy.

We realize the burden upon this great Court. We have read that only 200 cases can be reviewed annually out of 5,000 submitted. Our petition for certiorari is not a life-or-death criminal matter. But it does represent the last chance for approximately 800 older American citizens, many of whom have already died since this effort began

eight years ago, to recover their life savings, a total of twelve million dollars. What more can we do if plaintiffs' petition is denied?

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, et al
Plaintiffs

v.

RELIANCE INSURANCE COMPANY
Defendant

CIVIL ACTION
No. G-82-358

ORDER (No. 2)

BEFORE THE COURT is plaintiffs' motion to amend their complaint. The proposed second amended complaint seeks to add a non-diverse party defendant and to allege causes of action which are not in contempt of court order. Defendant is opposed to plaintiffs' attempt to add the non-diverse party.

Heritage Trust Co. (Heritage) was an investment trust company, owned and controlled by John R. Bromley and his wife. In the early '70's, Reliance Insurance Co. (Reliance) issued a bond to Heritage, agreeing to indemnify Heritage for losses due to Heritage employee dishonesty. When claimants, such as the Hatch plaintiffs, filed competing claims to the bond money, Reliance filed an interpleader action in Arizona federal court. As part of the interpleader, the Arizona district court permanently enjoined the prosecution or institution of actions relating to Reliance's issuance of its bond. Although the

interpleader was dismissed in 1982, the Arizona court found portions of the original complaint filed herein in contempt of its injunction.

This action was filed in state court and removed to this Court which has subject matter jurisdiction by virtue of diversity of citizenship. Plaintiffs are Texas residents and defendant Reliance Insurance Company is a Pennsylvania corporation.

Plaintiffs propose to add Bromley, a Texas resident, as a co-conspirator. As justification for the addition, plaintiffs assert they can obtain his testimony more easily if he is a party than if he is not.

The original complaint, in those counts not in contempt of the Arizona court order, alleged against Reliance that an interpleader action filed by Reliance was an abuse of process, that Reliance conspired with Heritage to defraud Heritage investors, and that Reliance negligently issued its bond of indemnification to Heritage. In their proposed amended complaint, plaintiffs have alleged only those counts; thus in that respect, the Court finds the amendment proper.

If a removed lawsuit comes within a federal court's subject matter jurisdiction when it is removed, a plaintiff generally is not allowed to change his petition to defeat jurisdiction. See St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938) (jurisdictional amount). See generally 14 Wright & Cooper, Federal Practice & Procedure 3723, at 598-99 (1976).

Regarding the addition of non-diverse parties, if, on

the one hand, they are indispensable parties, the Court must join them and remand would be proper. See Jeff v. Zink, 362 F. 2d 723, 726 (5th Cir.), cert. denied, 385 U.S. 987 (1966); Hilton v. Atlantic Richfield, 327 F. 2d 217, 219 (1964). See Stanhope v. Ford Motor Credit Co., 483 F. 2d 275, 277 (W.D. Ark. 1980). On the other hand, the Fifth Circuit has stated that joinder and remand of not indispensable parties is "clearly improper." In re Merrimack Mutual Fire Insurance Co., 587 F. 2d 642, 647 (5th Cir. 1978). Accord 1A Moore, Federal Practice 10.161(1), at 209 (2d ed. 1982). Thus, the critical question is whether Bromley is an indispensable party.

Co-conspirators are not indispensable parties. Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 463 (1945); Herpich v. Wallace, 430 F. 2d 792, 817 (5th Cir. 1970); Professional Investors Life Insurance Co. v. Roussel, 528 F. Supp., 391, 404 (D. Kan. 1981).

As an alleged conspirator, Bromley is not indispensable; hence, jurisdiction having been properly established in this Court, the Court finds that joinder of Bromley and the resulting remand would be improper. Thus, in this respect, the Court finds the proposed amended complaint improper.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiffs' motion to amend is GRANTED in part and DENIED in part; plaintiffs' motion to add John R. Bromley as party defendant is DENIED; plaintiffs' motion to amend the complaint so that it comports with the prior court order is GRANTED; and plaintiffs have ten (10) days to file an amended complaint without adding parties

defendant, unless prior permission of the Court is obtained.

DONE at Galveston, Texas, this the 29th day of June, 1983.

(Signed) HUGH GIBSON

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
GALVESTON DIVISION

ROBERT C. HATCH and
CLAUDIA R. HATCH, and
TRUSTORS OF HERITAGE
TRUST COMPANY,
Plaintiffs,
vs.
RELIANCE INSURANCE CO.
ET AL.,
Defendants

C.A. No. G-820-538

MOTION TO RECONSIDER
AND TO ALTER OR AMEND
ORDER NO. 2
(GRANTING PART AND
DENYING PART OF
PLAINTIFFS' MOTION
TO AMEND)

NOW COME plaintiffs herein and respectfully move this Court to alter or amend the above-referenced Order No. 2 after reconsideration of the findings of fact and conclusions of law set forth in said Order. Page numbers from Order No. 2 are referred to below to guide the Court to the most significant findings and conclusions which plaintiffs believe to be in error:

Page 1. Order No. 2 correctly finds that John R. Bromley and his wife owned and controlled Heritage. Plaintiffs' charge of conspiracy in this cause is not against Heritage, the defunct corporation. It is a charge that

Bromley and Reliance conspired together causing losses to trustors. At trial on the merits plaintiffs will show that the Reliance bonded insurance policy was intended to assure potential trustors that their investments were well protected against fraud or dishonesty.

Page 2, 1st paragraph. Order No. 2 correctly states that this action was filed in state court, but plaintiffs contend it has not been properly removed by virtue of diversity of citizenship. The statement that plaintiffs are Texas residents and defendant Reliance Insurance Company is a Pennsylvania corporation is not a finding of diverse citizenship as required by statute. Reliance is a billion-dollar wholly owned and controlled subsidiary of a New York holding company, which is solely owned by an aggrandizing family which bought the old 1890's Reliance Insurance Company in 1968 (changing the name of the holding company from "Leasco" to "Reliance"). In January, 1982 the family picked up outstanding minority shares in the holding company by the payment of $550,000,000—thus converting it to a solely owned private corporation. (Moody's Bank & Financial Manual, Vol 2, 1982). The consolidated corporation consists of the holding company which wholly owns and controls Reliance Financial Services which wholly owns and controls Reliance Insurance Company, which wholly owns and controls United Pacific Insurance Company. (Dun and Bradstreet's - Dun's Marketing Services - Million Dollar Directory, Vol I, 1982). As stated in Best's Insurance Reports, 1982, Reliance is a consolidated group or fleet.

Plaintiffs in their State court petition identify Reliance as "a consolidated corporation residing in the State of Texas, a commercially domiciled citizen of Texas." That Reliance is a consolidated corporation has never been denied by denfendant.

Page 2, 2nd paragraph. Plaintiffs have added Bromley, a Texas resident citizen, as an indispensable co-conspirator. Not only will his testimony be more easily obtained and have the added force of testimony by a party, the charge of conspiracy can only be brought against two or more persons. Plaintiffs direct the Court's attention to pp. 4 through 9 of their June 3, 1983 Memorandum of Points and Authorities, and to pp. 4 through 10 of plaintiffs' Response of June 23, 1983, attached and made a part of plaintiffs' "In General" Motion to Alter or Amend, transmitted herewith.

Page 2, 3rd paragraph. Plaintiffs' complaint is misstated in Order No. 2. The abuse of process count is set forth on page 4 of the Motion to Alter or Amend Order No. 1, transmitted herewith. The conspiracy count does not charge conspiracy with Heritage, but with Bromley and other officers of Heritage.

Page 2, last paragraph. We agree that remand is proper - in fact, is mandated - if an indispensable non-diverse party is added by amendment to a cause of action.

Page 3, top. In the Merrimack case cited in Order No. 2, the Court permitted, subsequent to removal, amendment to add two additional persons as defendants and affirmed remand to the State Court by the District

Court. Merrimack held that Section 1447 (c) allows remand since diversity was lost after the two resident defendants were added (please see pp. 5 and 6 of plaintiffs June 3, 1983 Memorandum of Points and Authorities). (And p. 5 of plaintiffs June 23, 1983 Response).

Page 3, 2nd paragraph. Two of the three cases cited in Order No. 2 have been previously distinguished from the case of Hatch v. Reliance. Neither of them concerned removal or remand. Georgia v. Penn Railroad Co., 324 U.S. 439 (1945), and Herpich v. Wallace, 430 F. 2d 792 (5th Cir. 1970) are well-analyzed in plaintiffs' Response of June 23, 1983 pp. 5, 6 and 7—attached as a part of plaintiffs' "In General" [illegible]tion submitted herewith. In Penn. Railroad Justice Douglas wrote, ". . . not all the conspirators are indispensable parties defendant." In Herpich it was held, where there were several defendants, that two parties who were not joined as defendants were not indispensable in considering dismissal for non-joinder.

The third case on the issue, cited in Order No. 2 for the first time, is: Professional Investors Life Insurance Co. v. Roussel, 528 F. Supp. 391 (Kansas D.C. 1981). Once again, there are several co-conspirators. Plaintiff had dismissed one of them - a resident defendant - to preserve diversity. Defendants moved that therefore all remaining defendants should be dismissed. The Court upheld the plaintiff's right to remove to preserve diversity, relying on Miller v. Leavenworth-Jefferson Electric Corp., 653 F 2d. 1378 (10th Cir. 1981), which was not a conspiracy case, so the presence of the party was not required under Rule 19 and Court could dismiss under Rule 21 to preserve diversity.

If this Honorable Court can show plaintiffs one case of conspiracy which does not include as defendants two or more conspirators, plaintiffs may be able to discover how, in any court, they can win their count of conspiracy against Reliance without adding the indispensable second co-conspirator, John R. Bromley. (As of the date of this motion, plaintiffs are advised that citations on Bromley have been issued; one has been returned from his last known address; the other, we believe has been served, but we do not yet have verified evidence that Bromley has received it).

In conclusion, plaintiffs believe the 5th Circuit opinion in Bobby Jones Garden Apts. v. Suleski, 301 F 2d 172, applies to this case. It is a Texas suit involving Texas law to be determined by a Texas court. The Texas law defining conspiracy is stated by the Texas Supreme Court in Great National Life Ins. Co. v. Chapa, 377 SW2 632: Conspiracy is "a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means."

Plaintiffs appreciate the grant of that part of their amendment which again complies with the purging in their cause of the questionable counts in their Original Petition. (Plaintiffs believe that their amended petition properly filed in the State Court before the arguable amendment of defendant's defective petition for removal was filed on June 29, 1983 accomplished such compliance).

But plaintiffs would appreciate even more - and do strongly urge - that, on reconsideration, Order No. 2 be

amended to grant plaintiffs' motion in full by accepting the amended petition as filed in the State court against the conspirators, Reliance and John R. Bromley.

Respectfully submitted,
July 11, 1983

By: (Signed)
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APPENDIX C

STATE OF TEXAS
COUNTY OF GALVESTON

ROBERT C. HATCH and CLAUDIA R. HATCH; and TRUSTORS OF HERITAGE TRUST COMPANY,	No. 123,743 and No. 114,361-A
Plaintiffs,	IN THE DISTRICT COURT
vs.	OF GALVESTON COUNTY
RELIANCE INSURANCE CO.	TEXAS
Defendant.	212th JUDICIAL DISTRICT

ORDER

This matter is before the court on motion by plaintiffs to confirm jurisdiction of this court in this cause. An effort has been made by a defective petition for removal filed by defendant to remove this cause from this state court to the United States District Court for the Southern District of Texas, Galveston Division. The cause has not been properly removed.

Following hearing, the court finds that the record of this case and the petition for removal contain no facts supporting transfer of this cause to the federal court. The filing of a notice of removal does not operate to deprive this court of its original jurisdiction, since the cause, reset as No. 123,723, is the same cause as No. 114,361 A, arising from the same transaction alleged throughout proceedings in this court initiated on March 30, 1977 and still pending.

As previously ordered by the court, Case No. 114,361 A was, through error, placed on the drop docket, and through error, was dismissed without notice to plaintiffs. Files of the ongoing action have been consolidated by this court, but out of respect for the federal court the two cases are being heard and litigated separately until that court removes or remands Case No. 123,723.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

Defendant's petition for removal of this case does not remove jurisdiction of this cause from this court inasmuch as it was not filed within thirty days of service of process on defendant on or about April 1, 1977.

Signed DON B. MORGAN
Judge

MEMORANDUM IN SUPPORT

1. 76 C.J.S. Section 221, p. 1086: ". . . The question of whether the record, as it existed at the time of filing the petition, showed on its face that the cause was removable having been one for the state in the first instance, and removability having been tested solely by the complaint and the petition for removal, a mere ex parte inspection of the record by the judge of the court to determine whether, on its face, the suit appears to be removable was sufficient."

2. 76 C.J.S. section 222, p. 1092: "The giving of notice of intention to remove did not operate as a transfer of jurisdiction from the state court to a federal court."

3. "This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record of the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not, in law, shown to the (state) court that it cannot proceed further with the cause . . . Having once acquired jurisdiction, the court may proceed until it is judicially informed that its powers have been suspended." (Phoenix Ins. Co. v. Pechner, 95 U.S. 183, 24L. Ed. 427).

4. If upon face of record, including petition for removal, a case does not appear to be a removable one, then state court is not bound to surrender its jurisdiction. (F & L Drug

Corp. v. Amer. Cent. Ins. Co., D.C. Conn. 1961, 200 F. Supp 718).

5. When garnishment proceedings are first instituted after rendition of judgment, in aid of execution, the garnishee's right to remove depends upon whether the garnishment action is an independent suit, since for removal purposes an action must be independent, not supplementary. (Overman v. Overman, D.C. Tenn. 1976, 412 F. Supp. 411). In Texas, garnishment is not an independent "civil action"; it is an ancillary proceeding because it must be based upon a valid unsatisfied judgment and execution. No. 114,361-A is ancillary to Case No. 114,361, in execution of that valid unsatisfied judgment.

6. Possession of res (garnishment bond debt) vested court which first acquired jurisdiction with power to adjudicate controversy, whether court took possession of specific property or not. (Pac. Tel & Tel. Co. v. Star. Publ. Co., D.C. Wash, 1924 S F. 2d 151). Although garnishment is no longer an issue in this case, due to federal ruling, jurisdiction was acquired of the garnishment res, other claims than garnishment were reserved by plaintiffs and are properly before this court which originally acquired jurisdiction. See p. 2, Supplemental Memorandum in support of Summary Judgment, dated July 12, 1977, Case #114,361-A.: "Plaintiffs' claims as third party beneficiaries, as cestui que trust and as persons injured by negligence and/or conspiracy by Reliance are not waived and are specifically reserved. . ."

7. Absent diversity of citizenship and a federal question,

redress for an intentional tort must be sought in state courts. (Weyant v. Mason's Stores Inc. D.C. Pa. 279 F. Supp. 283).

8. Diversity of citizenship must exist at time of filing original action as well as at time of petitioning for removal. (Rodrigues v. Continental Oil Co., D.C. Tex., 1971, 334 F. Supp. 656. Also 258 F. Supp. 780; and 256 F. Supp. 25).

9. For case to be removed from state court, federal court must possess prima facie jurisdiction from removal petition alone. (Electronic Data Systems Corp. v. Kinder, D.C. Tex. 1973, 360 F. Supp. 1044, affirmed 497 F 2d 222).

10. "A petition for removal, when presented to the state court becomes part of the record of that court and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends (Powers v. Chesapeake R. Co., 18 S. Ct., 169 U.S. 92, 42 L. Ed. 673).

11. In petition for removal it is not sufficient to allege in terms that the case is removable . . . or otherwise to rest the right of removal on mere legal conclusions, but there must be a statement of facts relied upon and not otherwise appearing . . ." (Heckeman v. Yellow Cab Transit Co., D.C. Ill. 1942, 45 F. Supp. 948). This case quoted the Supreme Court case of Chesapeake & Ohio R. Co. v. Cockrell, 1913, 232 U.S. 146, 34 S. Ct. 278, 58 L. Ed. 544).

12. In Carlton Properties Inc. v. Crescent City Leasing Corp., D.C. Pa., 1962, 212 F. Supp. 370 (cited in plaintiff's motion to remand and copy of opinion attached to plaintiff's second motion to remand, previously submitted to this court

for informational purposes) the opinion quotes from the 1889 U.S. Supreme Court case of Jackson v. Allen, 132 U.S. 27, at p. 34, 10 S. Ct. 9, 33 L. Ed. 249 as to the principal "citizenship of the parties at the commencement of the actions, as well as at the time the petitions for remand were filed, was not sufficiently shown and that therefore the jurisdiction of the state court was never divested. This being so, the defect cannot be cured by amendment. Crehore v. Ohio & Miss. Railroad Co., 131 U.S. 240, 9 Sup. Ct. Rep. 692."

13. The Carlton court continued, "Following the oral argument defendant presented a motion for leave to amend the petition for removal in the particulars noted. Since the petition for removal failed to allege a necessary jurisdictional fact, we have no jurisdiction in this matter except to declare our want of jurisdiction. A different question would have been presented if the petition to amend had been filed within the statutory time . . . within twenty days after the service of summons on the defendant." In the Hatch v. Reliance case, summons was served on August 11, 1982; the effort by defendant to amend is dated February 26, 1983 (the statutory period has been enlarged to thirty days, rather than twenty days).

14. The defendant in Carlton contends that a 5th CCA case permits amendment. The Carlton court distinguished amendment for more technical defects imperfectly cited, from jurisdictional defects, where no allegation of citizenship was made as of the time of filing the original suit, citing F & L Drug and Browne v. Hartford Fire Ins.

Co., 168 F. Supp. 796, which in turn cites two U.S. Supreme Court opinions - 191 U.S. 78, 48 L. Ed., 24 S. Ct.; and 169 U.S. 92, 18 S. Ct. 264, 42 L. Ed. 673.

15. 76 C.J.S. Section 240, p. 1106-7: "If, however, the court's jurisdiction was in fact lacking at the time of removal, and no right existed, any action in proceedings by such court looking toward a determination of the controversy are of no force or effect and any findings or orders made by it, other than an order to remand, are null and void."

APPENDIX D

DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

Sec. 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(As amended Oct. 21, 1976, Pub. L. 94-583, Sec. 6, 90 Stat. 2898).

APPENDIX E

RULE 19.
Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed,

the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

APPENDIX F

RULE 59.
New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966).